

Fact Sheet Regarding Settlement Between the OCC and Direct Merchants Bank

The Office of the Comptroller of the Currency (OCC) has entered into a consent order with Direct Merchants Credit Card Bank, N.A. The consent order requires the bank to cease certain practices in the marketing of the bank's credit cards and to pay approximately \$3.2 million in restitution to 62,000 consumers. These practices involved the bank's conduct of "downselling" consumers by prominently marketing to consumers one package of credit card terms, but then approving those consumers only for accounts with less favorable terms, and touting the approved account in a fashion designed to mislead the customer about the fact he or she had been "downsold." The OCC concluded that the bank's conduct constituted unfair and deceptive practices in violation of the Federal Trade Commission Act, and was unsafe and unsound within the meaning of the Federal Deposit Insurance Act. The OCC also concluded that the Bank violated the Truth in Lending Act (TILA) and Regulation Z by failing to disclose certain application or processing fees as "finance charges," and by failing to disclose in a table the rate, fee, and cost information for any account for which the consumer may be approved.

Unfair and Deceptive Practices

In the OCC's view, the following bank marketing programs could mislead consumers regarding what credit card terms a consumer would receive if the consumer submitted an application. Then, if a consumer chose to apply, the programs continued to mislead consumers through statements and omissions in the "welcome package" for the credit card about what terms that consumer had actually received.

Processing Fee Downsells

The solicitation package promised the consumer "guaranteed approval" and led consumers to believe that he or she was guaranteed approval for an unsecured card with no processing fee. A qualifying disclosure, that despite these representations the consumer in fact could be downsold to a card that required the consumer to pay a \$79 processing fee to be charged against the card, was made only in fine print on a separate insert. The solicitation package also stated that, once the bank received the consumer's application, the consumer could even be "upgraded" to the bank's "Titanium" credit card.

If a consumer was downsold to the \$79 processing fee card, the welcome package did not disclose that fact. Rather, the welcome package informed the downsold consumer that he or she had been "upgraded" to the Titanium card, and provided further information about the desirability of the Titanium card. The consumer would not be aware that he or she would have to pay a processing fee for the card until receiving the periodic statement, after the consumer had decided to accept the card.

In some mailings, over 50% of consumers who responded were downsold and required to pay the \$79 processing fee.

Unsecured to Partially Secured Downsell

In another program, the solicitation prominently told consumers that they were already approved and that they were pre-approved to receive an unsecured credit card with no annual fee. The solicitation failed to adequately disclose to consumers that they could be downsold to a less attractive partially secured card that would require a \$30 annual fee, be subject to a higher periodic interest rate, and require a \$99 deposit charged against the card. The solicitation stated that, once the bank received the consumer's application, the consumer could even be "upgraded" to the bank's Titanium card.

Thereafter, when downsold consumers received their card, the letter advising the consumer of approval prominently said "Congratulations!" and welcomed the consumer as a customer. The letter did not advise that the consumer had been approved only for the card with an annual fee, the higher interest rate, and a required deposit of \$99 that would be charged against the card. In addition, although the consumer had been downsold, the welcome package prominently stated that the consumer had been approved for the Titanium card (which the solicitation had termed an "upgrade") and provided information about the desirability of having a Titanium card.

Partially Secured to Fully Secured Downsell

The solicitation packages in this program prominently told consumers that they were already approved and that they would receive a partially secured credit card with a \$500 limit if they submitted a deposit of \$99. Other solicitation packages stated that the consumer did not need to submit any funds, and that the \$99 deposit amount would be charged against the card. The solicitation packages failed to clearly and adequately inform consumers that they could be downsold to a fully secured card with a credit limit equal only to the amount of their deposit. The solicitation package stated that, once the Bank received the consumer's application, the consumer could even be "upgraded" to the bank's Titanium card.

Thereafter, when downsold consumers received their card, the letter advising the consumer of approval prominently said "Congratulations!" and welcomed the consumer as a customer. The letter did not advise that the consumer had been approved only for a credit line equal to the amount of the consumer's deposit. Although the consumer had been downsold to the fully secured card, the welcome package advised that the consumer had been approved for a Titanium card, and provided information about the desirability of having a Titanium card.

Truth in Lending Act Violations

The bank charged application or processing fees only to approved applicants. The failure to disclose these fees as "finance charges" violated the Truth in Lending Act (TILA) and Regulation Z. The bank also failed to provide rate, fee, and cost information on the terms of downsell accounts in a table in its solicitations as required by TILA and Regulation Z.

Consent Order Provisions

The consent order requires that the bank pay restitution and reimbursement to cardholders who were downsold in these programs. The bank is required to refund any application or processing fee that the consumer had to pay because the consumer was downsold, and any annual fee or higher interest rate for the first year, if the consumer would not have had to pay the fee or higher interest rate if the consumer had been approved for the more favorable package. On the partially secured to fully secured downsells, if the same fee was applicable to both accounts, the bank must refund to downsold consumers that portion of the fee commensurate with the proportion by which the credit limit for the downsold account was less than the credit limit for the more favorable account.

The consent order also requires that the bank change its marketing practices and disclosures. The bank is prohibited from making any misleading or deceptive representation regarding what terms a consumer will receive if he or she submits an application. After the consumer submits an application, the bank is prohibited from making any misleading or deceptive representation regarding the terms for which the consumer has been approved. If the consumer has been downsold, the bank may not state the consumer has been “upgraded” or use a comparable characterization. If a consumer may be downsold, the bank must clearly and conspicuously disclose that possibility in the solicitation to the consumer, and must clearly and conspicuously disclose the terms of any less favorable account that the consumer may receive. In addition, when the bank informs the consumer that the consumer has been approved for a credit card, the bank must clearly inform the consumer if he or she has received the less favorable account, and the specific terms for which the consumer has been approved. The consent order also states preconditions before the bank may use the terms “guaranteed” or “pre-approved” in credit card solicitations.

The consent order also requires that the bank reimburse consumers for any application or processing fees that should have been disclosed as “finance charges” but were not. The consent order also requires that the bank disclose, in one or more tables as required by TILA and Regulation Z, all accounts or varying terms for which a consumer may be approved. The order requires that all such tables be equally prominently displayed in the solicitation.